

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 96
3023451

BETWEEN Olga Okorokova
Applicant

AND Greys Avenue Investments
Limited
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicant in person
No appearance for the Respondent

Investigation Meeting: 23 March 2018

Oral Determination: 23 March 2018

Record of Oral Determination: 23 March 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

A. Greys Avenue Investments Limited is ordered to pay the following amounts to Olga Okorokova within 14 days:

(a) The sum of \$796.67 gross under s 131 of the Employment Relations Act 2000 for wage arrears.

(b) The sum of \$71.56 for costs.

Employment Relationship Problem

[1] Greys Avenue Investments Limited (Greys Avenue) is the owner of a commercial office building in the central Auckland region. At material times Greys Avenue operated a small food market and superette in the foyer of this building. Olga Okorokova worked for Greys Avenue from 9 October 2017 until 26 November 2017 as the Superette's Manager.

[2] On 26 November 2017 Ms Okorokova tendered her resignation and finished work that same day. She claims this was as a result of Greys Avenue's failure to pay her wages. She claims recovery of wage arrears.

[3] No Statement in Reply was filed by Greys Avenue. In addition, there was no appearance for or on behalf of Greys Avenue at the investigation meeting.

[4] Prior to the investigation meeting a minute setting out, inter alia, the date of the investigation meeting was personally served on Greys Avenue. Service occurred on 28 February 2018 at Greys Avenue's registered office at Level 4, Swanson House, 12-26 Swanson Street, Auckland. A Notice of Investigation Meeting was served at the same time.

[5] This morning, the Authority Officer tried, unsuccessfully, to contact Greys Avenue to ascertain if there was a reason for it not appearing at the investigation meeting. Despite a delay to the start of the investigation meeting, Greys Avenue did not attend.

[6] No good reason has been provided for Greys Avenue's failure to attend the investigation meeting or be represented. As provided for in clause 12 of Schedule 2 of the Employment Relations Act 2000, I have proceeded to act as fully in the matter before me as if Greys Avenue had duly attended or been represented.

[7] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination were:

- a) Was Ms Okorokova employed by Greys Avenue?
- b) If so, has there been a default in payment of wages payable to Ms Okorokova and in what amount?

Issue One: Was Ms Okorokova employed by Greys Avenue?

[9] The first issue I need to determine is whether or not Ms Okorokova falls within the definition of employee under s 6(1)(a) of the Act. If she was not an employee the Authority has no jurisdiction to determine her claim.

[10] The meaning of employee is set out at s 6 of the Act. An “employee” is “any person...employed by an employer to do any work for hire or reward under a contract of service”.

[11] In deciding whether Ms Okorokova was employed by Greys Avenue, I must determine the real nature of the relationship between the parties. This assessment includes considering all relevant matters, including any matters that indicate the intention of the persons. I am not to treat as a determining matter any statement by the parties describing the nature of their relationship.

[12] The Supreme Court in *Bryson v Three Foot Six Limited*¹ addressed what “all relevant matters” in s 6 (3)(a) of the Act means. In *Poulter v Antipodean Growers Limited* the Employment Court summarised the applicable principles derived from *Bryson* and earlier judicial decisions as follows:²

- a) The Court must determine the real nature of the relationship.
- b) The intention of the parties is still relevant but no longer decisive.
- c) Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- d) The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the ‘fundamental’ test.
- e) The fundamental test examines whether a person performing the service is doing so on their own account.
- f) Another matter which may assist in the determination of the issue is industry practice although this is far from being determinative of the primary question.
- g) Ultimately the approach necessary to be taken under s 6 is for the Authority, or the Court, to gain an overall impression of the

¹ (No. 2) [2005] ERNZ 372

² [2010] NZ EmpC 77, 17 June 2010 at para[20]

underlying and true nature of the relationship between the parties.

The written and oral terms of the contract between the parties

[13] There was no written employment agreement. Ms Okorokova said the oral terms agreed by the parties were these:

- a) She would be employed by Greys Avenue as the Superette's Manager. The Superette had recently been acquired by Greys Avenue following the termination of its lease with the owner. Her position was temporary to enable the business to continue to trade whilst it was sold. This was to maintain goodwill with customers, trading history and amenity for the building's tenants. Following the sale of the business it was agreed Ms Okorokova would be engaged as the Office Administrator for another aspect of Greys Avenue's business.
- b) She would be paid \$20.52 per hour. This was based on an hourly rate of \$19 per hour plus 8% holiday pay.
- c) She would work from Monday to Friday from 7 am to 3 pm.
- d) She would provide Greys Avenue with an invoice for her time each week.
- e) She would be responsible for payment of her own tax.

[14] Ms Okorokova provided me with a letter drafted by Greys Avenue, and text messages, which supported her account of the terms agreed by the parties. Neither these documents, nor Ms Okorokova's oral evidence, assist with determining the real nature of the relationship between the parties. This is because there are indicators that the relationship was one for services and other indicators that it was more related to an employment agreement. I therefore move to address the control, integration and the fundamental tests.

Control Test

[15] The control test looks at the degree of control or supervision exercised by the employer over the alleged employee's daily work. The test asks whether the alleged employer had the right to control the person alleged to be an employee.

[16] Ms Okorokova had no control over the hours or days that she worked. She was required to work on set days and at set hours. She was not provided with a lunch-break, and was unable to leave the Superette during her working hours. If she was absent, she was not required to find a replacement. Ms Okorokova's sole-charge role was limited to serving customers of the Superette. She did not have the power to make decisions. These aspects of the relationship suggest Ms Okorokova was an employee.

Integration Test

[17] This test considers whether the work performed by the alleged employee is an integral part of the business and whether he or she has effectively become "part and parcel" of the organisation.

[18] I consider the work Ms Okorokova did was an integral part of the business. She was the only person working at the Superette. It could not have continued to operate without her being present and serving its customers. Whilst her evidence was that she provided "invoices" to her employer, in effect these were no more than a timesheet recording the hours that she worked. At the end of each week she would handwrite the hours that she worked and then write a figure that was owed to her. Her note did not include an invoice number, GST was not included on the figure claimed, and Ms Okorokova did not retain a copy. Her weekly hours were also sent by text to Greys Avenue. These aspects of the relationship also tend to suggest Ms Okorokova was an employee.

Fundamental Test/Economic Realty Test

[19] This test requires consideration as to whether Ms Okorokova was effectively working in business on her own account.

[20] In *Downey v New Zealand Greyhound Racing Association Inc*, the Employment Court indicated that the fundamental test requires an examination of

whether and how the applicant structures his or her alleged self-employed business.³ The Court noted aspects such as the methods of payment, taxation and the description of the applicant's business inserted in the GST invoices as indicative of the applicant operating in business on his or her own account.

[21] Assessing matters under the fundamental test, I find Ms Okorokova was not in business on her own account. The following matters have been material in my reaching this view:

- a) Whilst Ms Okorokova was to provide weekly invoices to Greys Avenue, these were no more than a handwritten timesheet of the days and hours she worked and the amount due to her. There was no invoice number, GST, notation or anything else to indicate it was an invoice.
- b) The text message exchanges between Ms Okorokova and Greys Avenue throughout the relationship consistently refer to payment of wages to her.
- c) Ms Okorokova acknowledges that it was agreed that she would be responsible for payment of her own tax. She said she was unhappy with this but felt she had no choice. She said she has derived no benefit from this arrangement. She said she has not tried to set off any expenses against this income.
- d) Ms Okorokova was not GST registered.
- e) Ms Okorokova has never contracted to a third party. Whilst she did work as a waitress at the time she was working for Greys Avenue, she said this was as an employee on weekends and weeknights. Her bank statements support her evidence.

Industry Practice

[22] There was no evidence of industry practise one way or the other.

Finding on Issue 1

³ (2006) 3 NZELR 501

[23] Standing back and looking at the matter overall I conclude, on the balance of probabilities, that Ms Okorokova was employed by Greys Avenue.

Issue Two: Wage Arrears

[24] Where there has been default in payment to an employee of any wages or other money payable under an individual employment agreement, those monies may be recovered by the employee.⁴

[25] Having questioned Ms Okorokova on her claim I am satisfied she is owed wages in the sum of \$796.67 gross. This sum has been calculated by multiplying the period of time that she was employed (7 weeks) by the hours that she worked each week (40). Taking this figure (280 hours) and multiplying by Ms Okorokova's hourly rate of \$20.52 I reach a figure of \$5,745.60 gross.

[26] From the sum of \$5,745.60 I deduct payments received from Greys Avenue which combined total \$4,948.93 gross. This sum is made up of four wage payments totalling \$4,027.20, two payments made from EFTPOS takings totalling \$881.73 and one cash payment of \$40. This leaves a sum of \$796.67 gross.

[27] Greys Avenue is ordered to pay Ms Okorokova the sum of \$796.67 gross within 14 days of the date of this determination.

Costs

[28] Ms Okorokova was not represented and therefore does not claim legal costs. Notwithstanding this she is entitled to recover the Authority's filing fee of \$71.56.

[29] I order Greys Avenue to pay the sum of \$71.56 within 14 days of the date of this determination.

Certificate of Determination

[30] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, that Ms Okorokova be provided with a certificate of determination. This is to be sealed with the seal of the Authority and record that within 14 days of the date of this determination, Greys Avenue Investments Limited is to pay Ms Okorokova:

⁴ Section 131 Employment Relations Act 2000

(a) The sum of \$796.67 gross under s 131 of the Employment Relations Act 2000

(b) The sum of \$71.56 for costs.

Jenni-Maree Trotman
Member of the Employment Relations Authority